v. *Manipur Administration,*[5] Tirumalpad J.C., in his judgment at p. 313, said:

"When next we come to the petition filed before the Sessions judge, we find that further reasons are mentioned for cancelling the bail. They are that the petitioner was involved in a cheating case previously, that he is a man of desperate character, that he was likely to kidnap the girl with the help of other associates of similar desperate character and further that the accused was found to have contacted some of the important witnesses since he was enlarged on bail. No details are mentioned as to the important witnesses the petitioner was said to have contacted. *Such vague allegations are not sufficient to cancel the bail.* The fact that the petitioner was involved in a cheating case previously is again no reason why bail should be refused in the present case. As I pointed out, the police have been going on adding more and more reasons in their desperate attempt to see that the petitioner was deprived of his liberty."

[Emphasis added].

In the present case, the learned Deputy only made vague allegations of harassment, tampering and intimidation in support of his application to revoke the bail in the court below. There was no oral or documentary evidences or even an affidavit to support the allegations.

The *Wee Swee Siang* case cited by the learned Deputy in the court below does not apply in this case. That case was concerned with the granting or refusal of bail.

The considerations for cancellation of bail are different from those for granting bail. Power to take back accused has to be exercised with care and circumspection in appropriate cases when, by a preponderance of probabilities, it is clear that the accused is interfering with the cause of justice by tampering with witnesses. See *Sohoni's Code of Criminal Procedure,* 18th edn. p. 4568. See also *The State* v. *Sanjay Gandhi.*[6]

Even when evidence is adduced in support of an application to cancel the bail granted to an accused person, the court should not allow the application without giving the accused person an opportunity to be heard first. *Sohoni's Code of Criminal Procedure* 18th edn. p. 4569.

For the reasons stated above, I set aside the revocation order made by the learned Sessions judge and order that the applicant be released forthwith on the terms of the bail bond executed by him and his sureties.

Order accordingly.

Solicitors: *Low Hop Bing & Associates.*

FIMA PALMBULK SERVICES SDN. BHD. v. SURUHANJAYA PELABUHAN PULAU PINANG & ANOR.

[O.C.J. (Mohamed Dzaiddin J.) July 13 & September 14, 1987]

[Penang – Originating Summons No. 346 of 1985]

Arbitration – Dispute as to appointment of arbitrator – Covenant relating to appointment of arbitrator – Subleases are assignments.

Land Law – Subleases – Subleases are assignments – Same interest transferred.

The first defendant is the registered proprietor of land within the Butterworth Port and by two leases, the first defendant leased to Kumpulan Fima Berhad the property known as Butterworth Deepwater Wharves for the purpose, *inter alia,* of erecting and thereafter repairing and maintaining a project.

By two subleases, Kumpulan Fima Berhad subleased the said property to the plaintiffs for the purpose of implementing the said project.

Thereafter, a dispute arose between the plaintiffs and the first defendant. The first defendant appointed the second defendant as an arbitrator, as the leases and subleases provided that disputes should be settled through arbitration. The first defendant asked the plaintiffs to appoint their arbitrator in accordance with the agreement. The plaintiffs, however, did not appoint any arbitrator. They contended that there was no privity of contract between the first defendant and the plaintiff and therefore there was no arbitration agreement between them.

The plaintiffs applied to set aside the purported appointment of the second defendant to act as an arbitrator.

Held: (1) as it had been established that there was no privity of contract between the first defendant and the plaintiffs, the first defendant cannot enforce the covenant of the sublease relating to the appointment of arbitrators;

(2) however, the subleases were actually assignments given by Kumpulan Fima Berhad to the plaintiffs;

(3) the plaintiffs' application was dismissed with costs.

Cases referred to:

(1) *Kepong Prospecting Ltd.* v. *Schmidt* [1968] 1 M.L.J. 170 P.C.
(2) *Yong Nyee Fan & Sons Sdn. Bhd.* v. *Kim Guan & Co. Sdn. Bhd.* [1979] 1 M.L.J. 182, 190.
(3) *Goh Gin Chye & Anor.* v. *Peck Teck Kian Realty Pte. Ltd. & Anor.* [1987] 2 M.L.J. 118.
(4) *Milmo* v. *Carreras* [1946] 1 K.B. 306.

ORIGINATING SUMMONS.

S.E. Rajah for the plaintiff.
Lim Peng Siew for the first defendant.
Manjit Singh for the second defendant.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: This is an application by the plaintiffs to set aside the purported appointment of the second defendant to act as an arbitrator in a dispute between the plaintiffs and the first defendant.

The facts which give rise to this dispute may be summarised as follows: The first defendant is the registered proprietor of land within the Butterworth Port and by two leases dated November 27, 1980 and September 2, 1981 ("the said leases), the first defendant leased to Kumpulan Fima Berhad the property known as Butterworth Deepwater Wharves for the purpose, *inter alia*, of erecting and thereafter repairing and maintaining a bulking installation ("the said project") for a period of seven years.

By two sub-leases dated October 11, 1982 ("the said sub-leases), Kumpulan Fima Berhad sub-leased the said property to the plaintiffs for the purpose of implementing the said project for the remainder of the period in the main leases. It is important to note here that although the sub-leases stipulated that the consent of the first defendant was required, they were nevertheless not a party to the said sub-leases. It is further noted that the leases and the sub-leases provided for arbitration in the event of any dispute or question arising between the parties under the leases and sub-leases in accordance with the Arbitration Act 1952. During the subsistence of the sub-leases, the plaintiffs took out a contract works policy of insurance with Commercial Union (Malaysia) Sdn. Bhd. dated September 15, 1981, whereby the insurers agreed to indemnify the plaintiffs and their contractors and sub-contractors for a total insured sum of $21,000,000.00 any loss, destruction, damage or liability concerning the said project or the plaintiffs incurring any legal liability as stipulated in the said policy.

By Contract Nos. 1 and 2 dated September 10, 1981 and Contract No. 6 dated March 4, 1982, the plaintiffs appointed United Engineers (M) Bhd. as the contractor, whilst by an agreement dated March 18, 1983, Juantara Konsultant Sdn. Bhd. was appointed the consulting engineers for the said project.

On February 22, 1982 the first defendant granted to United Engineers (M) Bhd. rental of a piece of land on the five-foot way along the bridge at the fourth, fifth and sixth entrance of Butterworth Deep Water Wharves on a monthly basis commencing December 15, 1981 for the storage of piles and building materials belonging to United Engineers (M) Bhd. Consequently, there had been some damage to access bridge No. 2 which was the bridge whose five-foot way between the 4th and 5th entrances was rented to United Engineers (M) Bhd. The first defendant alleged that it was due to the negligence of the plaintiffs and made an initial claim of $2,760.65. Subsequently, further claims were made and by letters dated June 8, 1983 and October 10, 1983, the first defendant's solicitors informed the plaintiffs that they were held liable to indemnify the first defendant for the cost of repairs estimated at $2,176,000.00 and requested for terms of settlement. Pursuant to the policy of insurance, the plaintiffs on July 18, 1983 forwarded the claim to their insurers, Commercial Union Assurance (Malaysia) Sdn. Bhd.

Both the leases and the sub-leases provide for the appointment of two arbitrators, one to be appointed by each party in the event of any dispute. Paragraph 6(7) of the annexure to the sub-lease provides as follows:

> "If any dispute or question whatsoever shall arise between the parties hereto with respect to the construction or effect of this sub-lease or any clause or thing herein contained or the rights duties or liabilities or either party under this sub-lease or otherwise in connection with the sub-leased land the matter in difference shall be determined by two arbitrators one to be appointed by each party according to the Arbitration Act, No. 93 or any statutory enactment in that behalf for the time being in force."

On May 10, 1984, the first defendant requested the plaintiffs to appoint their arbitrator. By a letter dated October 11, 1984, the first defendant notified the plaintiffs that they had appointed the second defendant as an arbitrator and requested the plaintiffs to nominate theirs. Then, by their letter dated March 9, 1985, the first defendant further notified the plaintiffs that they had appointed the second defendant the sole arbitrator under section 9(b) of the Arbitration Act 1952. By their letter dated March 20, 1985, the plaintiffs pointed to the first defendant's solicitors that there was no arbitration agreement between them and the first defendant, and hence there was no basis upon which an arbitrator was to be appointed by either the first defendant or the plaintiffs.

It is not disputed that the appointment of the second defendant as the sole arbitrator by the first defendant, made *vide* their letter dated March 9, 1985, was made under the powers provided in section 9(b) of the Arbitration Act 1952. The section reads:

> "9. Where an arbitration agreement provides that the reference shall be to two arbitrators, one to be appointed by

each party, then, unless a contrary intention is expressed therein –

(a) ...

(b) if on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for twenty-one clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the High Court may set aside any appointment made in pursuance of this section."

Mr. Rajah submitted that in view of the existing leases between the first defendant and Kumpulan Fima Bhd. and the two sub-leases created by Kumpulan Fima Bhd. to the plaintiffs, there is no privity of contract between the plaintiffs and the first defendant. The result of a privity of contract is that the covenants in the leases are mutually enforceable. However, in this case, counsel submitted that as there is no privity of contract between the parties, the first defendant has no right to call the plaintiffs to go to arbitration under the arbitration clauses in the annexures to the sub-leases.

Looking at the instruments of the lease and the sub-leases, it is clear to me that both sets were prepared in Forms 15A and 15B of the National Land Code. In the event, a lease of the said property was created by the first defendant in favour of Kumpulan Fima Bhd. and a sub-lease by the latter to the plaintiff which was duly registered. However, as for the sub-leases, Judith Sihombing in her book *National Land Code* under "Leases under the Code" at p. 411 seems to apply the English doctrine of privity of contract when she stated that:

"As between the lessor and the lessee there is privity of contract and privity of estate; as between the lessor and the sub-lessee there is neither privity of estate nor privity of contract; as between the lessee and the sub-lessee there is privity of contract and privity of estate ...

The result of privity of contract is that the covenants in the lease are mutually enforceable."

It is clear that the English doctrine of privity of contract applies to our law of contract (see *Kepong Prospecting Ltd.* v. *Schmidt*[1]). Therefore on the face of the instrument as well as in form, the documents are in fact sub-leases. As it has been established that there is no privity of contract between the first defendant and the plaintiffs, the first defendant cannot enforce the covenant of the sub-lease relating to the appointment of arbitrators.

However, it is the contention of the first defendant that in reality the sub-leases are assignments. Mr. Lim Peng Siew, for the first defendant, has persuaded me to consider the substance of the sub-leases created by Kumpulan Fima Bhd. to the plaintiffs. He submitted that the court can go behind the form and look at the intention of the parties, the reality of the situation and the essence of transaction to discover whether it was a sub-lease or an assignment. Counsel relied on a passage quoted by Hashim Yeop A. Sani J. in *Yong Nyee Fan & Sons Sdn. Bhd.* v. *Kim Guan & Co. Sdn. Bhd.*[2] which states:

"Equity adopts what is called the "metaphysical" approach and has a preference for substance over form and equity pays greater attention to the intention of the parties and the method used in arriving at an arrangement – see Keeton and Sheridan's *Equity*. This general principle was expressed by Romilly M.R. in *Parkin* v. *Thorold* (1862) 16 Beav. 59; E.R. 698:

'Courts of equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it finds that insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form and thereby defeat the substance'."

Counsel relied on the affidavits of Mr. Khoo Khay Huat, the first defendant's commercial manager, affirmed on October 21, 1985 and August 28, 1986 respectively (enclosures 22 and 28). Mr. Khoo maintained all along that the sub-leases created by Kumpulan Fima Bhd. in favour of the plaintiffs were in fact assignments. From his affidavits, the contents of which were never refuted or challenged by the plaintiffs, I come to the following finding of fact:

1) That on July 3, 1979, Kumpulan Fima Berhad informed the first defendant that on the direction of the Cabinet they would undertake the construction of bulking facilities in the Port of Butterworth. Pursuant to this direction they applied to the first defendant for lease of the said land.

2) At the meeting of December 10, 1979, Kumpulan Fima Berhad informed the first defendant that they were incorporating a subsidiary company to undertake the business of contracting and providing bulking facilities in Penang. On June 7, 1980, Kumpulan Fima Berhad informed the first defendant of the incorporation of the plaintiffs as their subsidiary company. Hence, the plaintiffs were incorporated and commenced business on August 19, 1980.

3) On March 15, 1982, Kumpulan Fima Berhad wrote to the first defendant asking for renewal

of the lease and consent of the first defendant to sub-lease the said property to the plaintiffs to enable the latter to obtain loans from commercial banks in order to finance the said project. This was followed by a further meeting held on April 27, 1982. Consequently, on May 21, 1982, the first defendant agreed to transfer the lease from Kumpulan Fima Berhad to the plaintiffs, but requested Kumpulan Fima Berhad to prepare a draft deed of assignment for their approval.

4) On June 15, 1982, Kumpulan Fima Berhad informed the first defendant that in their opinion a sub-lease to the plaintiffs would be more appropriate than the assignment because the said land had been earlier leased to Kumpulan Fima Berhad pursuant to a Cabinet directive for Kumpulan Fima Berhad to undertake the project. The first defendant acceded to this request. Hence the two sub-leases were accordingly prepared in Forms 15B National Land Code and were duly registered as such under section 222 National Land Code.

5) It was also disclosed that when notified about the damage, the plaintiffs on May 3, 1983 confirmed that they were responsible for implementing the said project and they requested that all correspondence in respect of the damage be addressed to them in place of Kumpulan Fima Berhad to enable "our lawyers to take further action without involving Kumpulan Fima Berhad".

Based on these undisputed facts and the surrounding circumstances, I can safely conclude that in substance the preliminary discussions between the first defendant and Kumpulan Fima Berhad culminating in the execution of the sub-leases were for the preparation of assignments. Being a subsidiary company of Kumpulan Fima Berhad, the plaintiffs' company was incorporated with the main object of undertaking the said project. I think what strikes me most from these facts is that the plaintiffs required the documents to be prepared as sub-leases instead of assignments to enable them to charge the said property to a consortium of commercial banks through Bumiputra Merchant Banks Bhd. for a loan of $18,000,000.00 (exhibit K9 of enclosure 2). Undoubtedly, this must be their prime consideration for insisting that the first defendant executes the sub-leases instead of the deed of assignments.

There are clear authorities which say that the intention of the parties is an important consideration in determining the contractual relationships but in every case the intention must be sought from the substance, the conduct of the parties and the surrounding circumstances (see *Goh Gin Chye & Anor.* v. *Peck Teck Kian Realty Pte. Ltd. & Anor.*[3]).

Based on my above conclusions, and following the principle expressed by Romilly M.R. in *Parkin* v. *Thorold (supra),* I am satisfied that the said sub-leases are actually assignments given by Kumpulan Fima Berhad to the plaintiffs. Cheshire and Burn's *Modern Law of Real Property,* 13th Ed. says at p. 439 that on making what purports to be an assignment there must be transferred to the assignee the whole interest under the lease and the other point is that the sub-lessee must take the identical interest which the lessee possessed.

> "But there is no magic in words. If a man had acquired an interest in the tenancy and a question arises with regard to his position, the first point that falls to be considered is whether he has taken the whole of the tenant's interest. Thus where the tenant executes a deed couched in the form of an underlease, which purports to sub-let the property for the whole of the remainder of his term, or for a longer period, the transaction amounts to an assignment." *(ibid).*

In this case, the instrument was registered as a sub-lease and was for a term terminating on the day before the lease would expire. However, the term is renewable in both the lease and the sub-lease and both are capable of being renewed to end on the same day. Since the sub-lease is capable of being renewed to last precisely the same length of time as the lease may be renewed, the sub-lease should be construed as an assignment, being a demise of the whole term – *Milmo* v. *Carreras.*[4] Further, an identical interest is also transferred, *i.e.* the rights and obligations under the lease to build, construct and maintain the bulking installations.

For the above reasons, the plaintiffs' application is dismissed with costs.

As for the position of the second defendant in this application, I find there is no justification for bringing him in as a party. In the circumstances, I order the plaintiff to pay his costs in connection with this application.

Order accordingly.

Solicitors: *Zain & Co.; Lim Huck Aik & Co.; Sri Ram, Zulkifly & Kumar.*